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In the Supreme Court of the United States

October Term - 1948

Case No. Misc. 413

JAKE BIRD,

Petitioner

vs.

STATE OF WASHINGTON,

Respondent

BRIEF OF RESPONDENT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S APPLICATION FOR WRIT OF CERTIORARI

PREFACE

"A review on Writ of Certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefore. The following, while neither controlling or fully measuring the court's discretion, indicate the character of reasons which will be considered;

(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court." Rules of the Supreme Court of the United State 38-5.

Respondent, State of Washington, believes that this Rule merits particular attention in a consideration of the instant case.

Respondent opposes Petitioner's application for a writ of certiorari. We desire to advise this Honorable Court so fully at the outset concerning the circumstances of the matter that no difficulty will be had in determining wherein lies the truth, to the end that this unedifying travesty on justice may be timely and finally concluded and effect be given to the verdict of the jury below.

STATEMENT OF THE CASE

Petitioner, Jake Bird, was tried in the Superior Court of Pierce County at Tacoma· Washington, on November 24, 1947, on an information charging murder in the first degree for the death of Bertha Kludt. The jury returned a verdict of guilty and imposed the death penalty. No defense was offered by Jake Bird (R.96, 110-111).

The facts of the case are briefly that Jake Bird killed Bertha Kludt and her daughter Beverly with an axe while burglarizing their home at 1007 South 21st Street in Tacoma, about 2:00 A. M. of October 30, 1947; that neighbors, alarmed by the screams from the Kludt home, called police; that officers responding to the call saw petitioner as he left the rear entrance of the Kludt home (R.78 & 123), pursued and captured him nearby and placed him under arrest after a struggle which resulted in knife wounds to both officers and considerable injury to petitioner; that petitioner was turned over to Officers Hickey and Skattum (R.26) while the arresting officers went to the hospital; that petitioner was then taken to the hospital and enroute was struck several times by Officer Hickey (R.32-33); that Officer Skattum was ordered to return as he was needed at the scene, then with Officer Hickey driving (R.37), the petitioner was again returned to the hospital and subsequently to the City Jail where he was booked.

The murder weapon, an axe, was recovered at the rear of the home, the black patent leather purse of Mrs. Kludt was found beside the home along Bird's line of flight, petitioner's shoes were recovered at the first fence he cleared. At the trial, Dr. Charles P. Larson, pathologist, identified tissue found on the axe, purse and trousers of Jake Bird, as human brain tissue (R123).

Some hours after being booked and lodged in the city jail, petitioner was interrogated by Detective Lt. Sherman Lyons in the presence of Deputy Prosecuting Attorney Earl D. Mann and Dr. George A. Rickles, a psychiatrist in private practice, making a full oral confession, which was then reduced to writing, read and corrected by petitioner, and signed and sworn to before a Notary Public. When transferred to the County Jail, petitioner made a complete and unsolicited oral confession to Chief Criminal Deputy Sheriff Sig Kittleson (R.65).

The judgment of the trial court was affirmed by the Supreme Court of the State of Washington on November 4, 1948. (R. 148-155). 131 Wash. Dec. 725; 198 P 2d 978; and petition for rehearing denied November 30, 1948, and judgment entered December 1, 1948.

ANALYSIS OF PETITIONER'S "STATEMENT OF JURISDICTION"

Petition sets out the requirement:

> "1. There must be a right under the Federal Constitution specifially set up and claimed before the Court of last resort of the State."

The record which has been certified to this Court by the Clerk of the Supreme Court of the State of Washington is silent on any such right having been specifically set up and claimed. The only time an attempt was made was on occasion of petitioner filing a Petition for Writ of Habeas Corpus on December 18, 1948, with the Supreme Court of the State of Washington. Observe:

> "1. (c). By the Court of last resort denying petitioner's claims which were fully set up before it in the petition for habeas corpus (Appendix 3, pages 2-3) (Denied, Appendix 5)."

Petitioner's Statement of Jurisdiction 1. (b) (2).

"By refusing petitioner a record to use on appeal in order to place before the Appellate Court what occurred in the trial court" is foreclosed by Section 2 of the same Statement of Jurisdiction since more than three months have elapsed since the time of the final judgment of the Supreme Court of the State of Washington on that question. (R.74-84). *State ex rel Bird vs. Superior Court*, 130 Wash. Dec. 734, 194 P2d 374.

Petitioner in both the heading:
"Reasons Relied on for the issuance of the writ" and
"Statement of Jurisdiction"

persists in endeavoring to impress the court that a right under the Federal Constitution was specifically set up and claimed before the Court of last resort of the State of Washington. The record is silent on any claim of violation of right under the Federal Constitution. In petitioner's own brief on appeal below, he refers but twice to a Constitutional right, (R.102), concerning a preliminary hearing and (R.106) right to counsel. Also he admits in this present petition in this Honorable Court, at page 7-8 that he didn't know that "under the Act of Congress in order to ask that my rights under the Federal Constitution be protected, that I must first specifically set up and claim them in the state court."

This is no more inconsistent than we have ever found this petitioner, but it demonstrates somewhat the difficulty of judicially meeting his many and varied assertions.

ANALYSIS OF PETITIONER'S "SPECIFICATION OF ERRORS"

The petitioner sets up three numbered specifications:

1. "In holding that a confession obtained under circumstances of torture as shown herein could be used in evidence against him."

The En Banc opinion of the Supreme Court of the State of Washington (R.150-151) 131 Wash. Dec. 725; 198 P 2d 978, holds that the confession was not made under the influence of fear produced by threats.

2. "In holding that petitioner was not entitled to have a full, true, and correct transcript of the proceedings had at the trial, to place before the appellate court."

The En Banc opinion of the Supreme Court of the State of Washington (R.74-84) *State ex rel Bird*, 130 Wash. Dec. 734, 194 P 2d 374, dated May 26th, 1948, affirms the decision of the court below denying petitioner's application for a transcript under Remington's Revised Statutes 42-5. Since more than three months have elapsed since that final judgment that matter is res adjudicata and the petitioner is precluded from raising that issue at this time in this court. 28 USCA 350.

3. "In denying the petitioner's claims that to torture him until he was in fear of his life, and thus obtaining a confession, and using such confession against him—when at the time of the so-called confession petitioner had not been brought before any court, nor was represented by counsel the court erred in holding that this was a denial of due process under the 14th Amendment."

This error specified is not now before this court as it was first raised in Petition for Writ of Habeas Corpus filed in the Supreme Court of the State of Washington on December 18, 1948, and said petition was denied by that court on January 11, 1949. The matter

is now presented in an effort to impress this court that a Federal question was raised in the State court at time of trial and on appeal. Such was not the case (R.148-155).

3 (a). "Likewise, the state court erred in holding that to deny petitioner his record on appeal, was not repugnant to the due process clause of the 14th Amendment."

This is also a matter raised in the Petition for Writ of Habeas Corpus, and a further effort to impress this Court that a Federal question was specifically presented in the State Court. The matter is fully treated by the En Banc opinion of the Supreme Court dated May 26, 1948, *supra*, R.74-84. Note particularly concurring opinion of Schwellenbach, J. (R.79-80), citing *McKane vs. Durston*, 153 U. S. 684, 38 L. Ed. 867, 14 S. Ct. 912.

SUMMARY OF ARGUMENT

I. No Federal question is properly presented by petitioner.

II. Petitioner cannot include in this proceeding the matter of the decision January 11, 1949, of the Supreme Court of the State of Washington, denying his petition for Writ of Habeas Corpus. (Decision unreported).

III. The question relative to the transcript of the trial court record for use on appeal is foreclosed in this court by decision of the Supreme Court of the

State of Washington in *State ex rel Bird vs. Superior Court* (R.74-84) 130 Wash. Dec. 734, 194 P 2d 374.

IV. The confession (R.66-68) challenged by petitioner is free and voluntary and satisfies the most exacting criteria of every test of this court in its reported decisions.

ARGUMENT

I.

Petitioner did not specifically raise a violation of a right under the Federal Constitution during the trial of the case below nor on the appeal from the judgment of the trial court. The record here (R.1-175) is silent as to any such violation claimed in this petition.

II.

Petitioner has made application for a Writ of Certiorari to review the judgment of the Supreme Court of the State of Washington dated December 1· 1948, decided by a full court November 4, 1948, *State vs. Bird*, 131 Wash. Dec. 734, 194 P 2d 374. He belatedly recognizes the absence of a substantial Federal question in that case, and seeks to remedy the defect by filing a Petition for a Writ of Habeas Corpus in that court December 18, 1948, alleging violation of Federal Constitutional rights, which was denied January 11, 1949. Now he seeks to superimpose on this petition an application for a Writ of Certiorari to review the

judgment denying Habeas Corpus. Argument on that point is surely needless.

III.

On the appeal below the petitioner, through his counsel, Tuttle and Luce, Attorneys, of Walla Walla, Washington, made application under Remington's Revised Statutes Sec. 42-5 to the Superior Court of Pierce County for a transcript of the court reporter's shorthand notes of the trial at public expense. This was denied on April 2, 1948, by the Hon. Hugh J. Rosellini, judge of the Superior Court of Pierce County. After considering the Order denying that application, Mr. Tuttle and Mr. Luce determined not to appeal that decision. The petitioner appeal the decision *in propia persona*, and argued the matter before our Supreme Court on May 21· 1948, declining counsel appointed by the Supreme Court (R.76). May 26, 1948, the Supreme Court affirmed the court below and ordered the remittitur to go down immediately. (R.74-84) *State ex rel Bird vs. Superior Court*, 130 Wash. Dec. 734, 194 P 2d 374. The petitioner did not petition this court for a Writ of Certiorari to review that judgment within three months, 28 USCA 350, and consideration of that question at this time in this court is foreclosed.

It is submitted that under the decisions of this court consideration of that question would not be proper in any event.

"A review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted was not at common law and is not now a necessary element of due process of law. It is wholly within the discretion of the state to allow or not to allow such a review. A citation of authorities upon the point is unnecessary.

"It is therefore, clear that the right of appeal may be accorded by the State to the accused upon such terms as in its wisdom may be deemed proper. In a large number of states an appeal from a judgment of conviction operates as a stay of execution only upon conditions similar to those prescribed in the New York Code of Criminal Procedure; in others a defendant, convicted of felony, is entitled of right to a stay pending an appeal by him. But as already suggested, *whether an appeal should be allowed, and if so, under what circumstances or on what conditions, are matters for each state to determine for itself*" (emphasis supplied). *McKane v. Durston*, 153 US. 684, 687, 38 L.Ed. 867, 868, 14 S.Ct. 913.

Also

"The safeguards of an appeal are different in nature and purpose from those of a jury trial. At common law there was no review of criminal cases as of right. Due process does not comprehend the right of appeal, (citing) *McKane v. Durston.*" *District of Columbia v. Clawans*, 300 U. S. 617, 627, 81 L. Ed. 843, 847, 57 S. Ct. 660.

IV.

We apprehend that this Honorable Court may be more concerned with Petitioner's allegations concerning his confession and might conceivably be persuaded

to grant certiorari for the purpose of an independent examination to determine its voluntary character.

We believe implicitly that its voluntary character is so clear as to gainsay argument to the contrary and will be demonstrated to the satisfaction of this court.

What are the facts as disclosed by any competent record, and not by the unsworn self-serving declarations of this petitioner?

First, since the petitioner states again and again how he was brutalized and subjected to inhuman torture to force this confession, let us examine the record as to his injuries and how he received them.

Officer Hickey testified (R.26) that on arriving at a point on the west side of Jay Street, South of 21st Street, he found the petitioner lying on the parking and Officers Sabutis and Davies standing over him. He noticed that the petitioner was bleeding about the face and mouth, and that both officers were wounded and bleeding from cuts. The petitioner was handcuffed and placed in the patrol wagon, the wounded officers going to the hospital. Officer Hickey, with Skattum driving, and the petitioner inside the patrol wagon proceeded to the scene of the alleged crime, 1007 South 21st Street. There, Hickey alone entered the home to obtain instructions from his superior (R.27-30), returning to the patrol wagon with Lt. Corneilson to show him the petitioner, again observing

(R.31) that the petitioner was bleeding about the face and mouth and "showed evidence of having been in a fight." He then, upon instructions, ordered Skattum to drive to the hospital, and he entered the rear of the wagon with the petitioner. Enroute to the hospital, patently affected by the scene of carnage in that peaceful home and the sight of his bleeding brother officers, this young patrolman, but recently out of United States Naval Service, lost his head and struck this petitioner with his fist and several times with his club, then desisting in disgust, resumed his place at the rear of the wagon. (R.31-33).

Almost immediately on reaching the hospital it was necessary to return to the scene as Officer Skattum was needed there. (R.34-35). Then Officer Hickey returned petitioner to the hospital, himself driving the wagon, and followed by two detectives in another vehicle.

That was the only occasion that Officer Hickey laid a hand on this petitioner, the first trip to the hospital. On the second trip (R.35 and 36) he testifies as to the doctor giving treatment to the petitioner, while the petitioner was examined for evidence.

The petitioner was not harmed after that occasion and there is no testimony or competent evidence tending to show that he was thereafter mistreated in any way.

In the withering cross-examination of Officer Hickey by Mr. Selden, defense counsel, it is established that petitioner was injured considerably in the course of his capture. Note Mr. Selden's questions (R.42):

> Q. Well now, officer, when you put that man into the wagon there to take him to the hospital, he was a pretty badly beaten up man at that time, wasn't he?
>
> A. No, I would not say he was. He was bleeding around the face and head, but that is all that I could see.
>
> Q. Did you know at that time that he had three underteeth knocked out?
>
> A. No.
>
> Q. Did you see those cuts and bruises on his head?
>
> A. I didn't care to get too close to him.
>
> Q. No, and didn't care. Didn't make any examination.
>
> You didn't see the blood all over his clothing.?
>
> A. I saw blood on his face and head.

Is it not perfectly logical to believe that petitioner was thus injured prior to Hickey's attack? Is not this questioning consistent with a desire of defense counsel to influence the jury—depicting Hickey as a brutal officer beating upon a badly beaten and defenseless prisoner? Had petitioner in fact lost his teeth at a later time, or received further physical mistreat-

ment, would there not also have been an offer of proof of such fact by the petitioner? But petitioner did not take the stand nor were any witnesses called on his behalf. (R.96, 110-111, 126).

The petitioner's reply brief on the appeal below (written by himself) has been certified as part of the record from the Washington Supreme Court. Therein (R.126) the petitioner sought to impress the Washington Supreme Court that Officer Sabutis offered him violence at the City Jail, and also that there were further witnesses. The Supreme Court of the State of Washington not only had that brief before them, but had the advantage of listening to petitioner argue that and other matters for two hours and twenty-five minutes. They found no substantial merit in petitioner's contention and we submit that these exaggerated claims of this petitioner are patently not the facts in the case. Officer Hickey's testimony (R.26-46) is the only duly authenticated trial record of the petitioner's mistreatment.

But was there any connection between this admitted mistreatment and any confession? No. The testimony of Officer Hickey completely negatives any design to obtain an admission or confession. In fact, he specifically denied that he had any idea of trying to make petitioner tell him anything (R.33-34, 46). He just lost his temper.

The facts in the record of the trial relating to the confession are found in the testimony of Lt. Sherman Lyons (R.47-55) and Dr. George A. Rickles, a private physician specializing in neurology and psychiatry. (R.56-62).

Lt. Lyons' testimony is to the effect that he came on duty between 7:45 and 8:00 A. M. that same day, and shortly thereafter saw petitioner in the Identification Bureau where he was being photographed and fingerprinted. (R.47). Before talking to petitioner Lt. Lyons caused him to be again taken to the hospital to make sure he was in proper condition physically to be interrogated (R.48). Then about 11:00 A. M. he caused petitioner to be brought to his office, where, in the presence of Deputy Prosecuting Attorney Earl D. Mann and Dr. George A. Rickles, the petitioner was interrogated. That the petitioner talked freely and spontaneously is clearly evident from the testimony of Dr. Rickles. (R. 57). In fact, according to Dr. Rickles (R.59) the petitioner

> "voluntarily and spontaneously made the statement 'I am not going to lie to you; there is no need of my lying, it is all over with now, there is no sense of my lying about this'."

We point out that Dr. Rickles specializes in psychiatry and is particularly competent to testify as to the psychological reaction of this petitioner, and as to the petitioner's having been under any coercion or psychological compulsion to make a confes-

sion. Note his testimony (R.57) as to the peaceful atmosphere and lack of tension in Lt. Lyons' office. Note how freely petitioner talked, told them all about it, when he got to town, where he'd been, prison terms he'd served, how he was out looking for a place to burglarize, went into this home and the fight there, and then being chased and caught and the fight with the officers. Note again Dr. Rickles' testimony (R.61).

Q. Did he refer to the use of any kind of an instrument?

A. Yes, with the policeman or in the house?

Q. In the house.

A. He referred to it, but I don't remember whether—most of these statements that I state, Jake Bird made spontaneously without any urging of any type, but as to an instrument, he was asked directly about that. In fact, I think that you asked him directly where he picked up the axe which he was not able to answer specifically at the time, but all he knows he had something with him when he came in to the kitchen, which he spoke about that he laid down in the kitchen before he went into the bedroom. Oh, he did mention another instrument spontaneously come to think about it. He mentioned this knife that he had, a knife of his own, and which he used also.

After these conversations this oral confession was reduced to writing (Ex. A-7, R.52) (R.66-68), corrected and initialed by petitioner in two instances, signed and sworn to before a Notary Public.

Reading the testimony of Lt. Lyons and Dr. Rickles and this confession together, the conclusion is overwhelming that this instrument represents absolutely the free and voluntary statement of the petitioner and clearly evidences that the petitioner's freedom of choice was not one whit impaired. Compare the language of the confession with the petitioner's other expressions in his brief on appeal (R.85-118) and his reply brief (R.119-143).

As if the issue were not already clearly enough resolved consider the petitioner's volunteered, unsolicited account of this crime to Chief Criminal Deputy Sheriff Sig Kittleson (R.63-65). In addition the petitioner voluntarily informed Kittleson that he had an eighth grade education.

We have outlined the facts of petitioner's injuries, and the facts of the confession. The duly authenticated and uncontroverted testimony of four witnesses on the trial (R.26-65) establishes beyond question that there is not any connection between the injuries suffered and the confession made.

The petitioner's view on his injuries, as of that time, is adequately expressed by this line in his confession:

> "I was beaten up by the police officers about the head and face, mouth, side, before I was taken to the hospital." (R.66-68).

Then, further, as to any other mistreatment:

> "I make this statement because I want Mr. Mann and Mr. Lyons to have all the facts and

the truth. I have not been mistreated by them and no promises nor duress have been used to get me to make this statement." (R.66-68).

As to whether the petitioner understood the nature of these proceedings, observe Lt. Lyons reply to Mr. Selden:

Q. Did he understand what you meant, do you know?

A. Yes, he said he had been around a lot and knew all those things. (R.55).

The law in the State of Washington on confessions rests on a statute—Remington's Revised Statute Sec. 2151:

"The confession of a defendant made under inducement, with all the circumstances, may be given as evidence against him, except when made under the influence of fear produced by threats; but a confession made under inducement is not sufficient to warrant a conviction without corroborating testimony."

The Washington State Supreme Court in the case of *State v. Wilson*, 68 Wash. 464, 123 Pac. 795, on page 467 said:

"* * * Unless it appeared that the confession was made under the influence of fear produced by threats, it was the duty of the court to admit the confession or statement in evidence. Where the evidence is in conflict upon this point, the question is then for the jury."

To like effect are the cases of:

State v. Van Brunt, 22 Wn. (2d) 103, 154 P. (2d) 606;

State v. Clark, 21 Wn. (2d) 774, 153 P. (2d) 297.

Quoting the opinion of the Washington State Supreme Court in the instant case on the matter of the confession:

> "Appellant next contends that his confession should not have been admitted in evidence, for the reason that it was made under the influence of fear produced by threats, and that he was physically abused to extract the confession from him. The statute (Rem. Rev. Stat., Sec. 2151) provides that 'The confession of a defendant made under inducement, with all the circumstances, may be given as evidence against him, except when made under the influence of fear produced by threats; but a confession made under inducement is not sufficient to warrant a conviction without corroborating testimony.'
>
> "A fair reading of the confession is an answer to appeallant's contention that the confession was made under the influence of fear produced by threats, or extracted from him by brute force. The confession recites that appellant was sworn by a notary public before he signed the confession, and that the confession was voluntary. There are two places in the confession where the typed statement was not in conformity to what the appellant deemed to be the truth. A line was drawn through each of these statements and appellant initialed each of these deletions. It is clear from those corrections that appellant knew what he was dong, and that he had carefully read the confession and was satisfied with it as corrected. The testimony of four witnesses who heard the confession supports the position of the state that the confession was voluntary and was not made under the influence of fear produced by threats.
>
> "There is no showing that the confession was made under the influence of fear produced by threats; therefore, it was the duty of the court

to admit the confession in evidence. Where the evidence is in conflict on this point, the question is then one for the jury. *State v. Clark*, 21 Wn. (2d) 774, 153 P. (2d) 297. As to whether the jury was properly instructed as to the conditions under which the confession was obtained, we are not informed; hence, it must be conclusively presumed that the court properly charged the jury on this phase of the case."

State v. Bird, 131 Wash., Dec. 725, 728, 198 P. 2d 978, 980.

We invite this honorable court's consideration of Wigmore Evidence, 3rd Ed., Section 831:

"In several American jurisdictions, the Legislature has dealt with the subject of confessions by adopting some definition of the inducement which is to exclude them. But these statutes seldom do more than accept some common-law rule, and cannot be said on the whole to have effected any change, much less any improvement; except that in Hawaii, Indiana, and *Washington* the radical step of desirable reform (post, Sec. 867) has been taken, and the traditional rules are practically superseded."

The petitioner cites the following decisions of this court in support of his petition:

Brown v. Mississippi, 297 U. S. 278, 80 L. Ed. 682, 56 S. Ct. 461;

Malinski v. N. Y. 324 U. S. 401, 89 L. Ed. 1029, 65 S. Ct. 781;

Lee v. Mississippi, 332 U. S. 742, 92, L. Ed. Adv. Op. 315, 68 S. Ct. 300.

Cole v. Arkansas, 333 U. S. 196, 92 L. Ed. Adv. Op. 429, 68 S. Ct. 514.

The *Brown* case recites a set of facts so extremely at variance with the facts surrounding this petitioner's confession that it is clearly not in point. In that case the only evidence the State of Mississippi had was the confessions of those hapless negroes, and it was clearly established that they were procured by beatings and whippings. Not so with this petitioner's confession.

The *Malinski* case is likewise not in point on the facts. There the evidence was extreme on the point of coercion and duress for the sole purpose of obtaining a confession. Not so with this petitioner, the evidence is wholly that he freely and spontaneously volunteered the information.

The *Lee* case is further authority for the rule that "the due process clause of the Fourteenth Amendment invalidates a state court conviction grounded in whole or in part upon a confession which is the product of other than reasoned and voluntary choice."

The *Cole* case is not in point. Due process would certainly require reversal of a conviction obtained on a charge other than alleged.

In all of the cases cited by the petitioner, there is considerable evidence tending to establish the fact that the confessions involved were to some extent "products of other than reasoned and voluntary choice." In the instant case, however, it is quite clear that all the evidence is to the contrary and that the petitioner's con-

fession is most certainly the product of reasoned and voluntary choice. The language and expression of this confession, this petitioner's first writing in the case, is so in accord with the language and expression and style of his later writing (Brief on appeal, R.85-118—Reply Brief, R.119-143), and parts of the instant petition obviously prepared by himself, that one marvels at the calmness with which he expresses himself in his confession. Then note how he carefully deletes the two erroneous portions and initials the deletions. That's not a picture of a Lee, Brown or Malinski. No. At no time is this petitioner's situation in any way analagous to the peril to which those defendants were exposed.

We desire particularly to note some other decisions of this court on this question of confessions.

The case of *Haley v. Ohio*, 332 U. S. 596, 92 L. Ed. Adv. Op. 239, 68 S. Ct. 302, decided January 12, 1948, appears to be the last extensive decision on this subject. In that case, Haley, a boy of fifteen, was taken from his home at midnight, five days after the alleged crime occurred, removed to the police station and there subjected to a grilling and examination of disputed intensity for the purpose of obtaining his confession. That is not at all analagous to this petitioner's situation, as we have pointed out above. Mr. Justice Frankfurter points out that

> "He was questioned for about five hours by at least five police officers who interrogated in relays

> of two or more. About five o'clock in the morning this procedure culminated in what the police regarded as a confession, whereupon it was formally reduced to writing."

Haley v. Ohio, supra, at page 245.

then, further,

> "The Ohio Courts have in effect denied that the very nature of the circumstances of the boy's confession precludes a finding that it was voluntary. Their denial carries great weight, of course. It requires much to be overborne."

then proceeds, at p. 246:

> "In concluding that a statement is not voluntary which results from pressures such as were exterted in this case to make a lad of fifteen talk when the Constitution gave him the right to keep silent and when the situation was so contrived that appreciation of his rights and thereby the means of asserting them were effectively withheld from him by the police, I do not believe I express a merely personal bias against such a procedure."

But do the facts in this petitioner's case bring him within the protection of that language? Not by any stretch of the imagination.

We note also the recent case of *Andrew Uphaw, petitioner, vs. U. S.*, decided December 13, 1948. No. 98—October Term, 1948. While the case is Federal in character and result, we were interested there in the court's treatment of the question of voluntariness.

Mr. Justice Black writing for the court, stated:

> "Pre-trial confessions of guilt without which petitioner could not have been convicted were ad-

mitted in evidence against his objection that they had been illegally obtained. The confessions had been made during a thirty-hour period while petitioner was held a prisoner after the police had arrested him on suspicion and without a warrant."

The decision reversing the judgment rests on noncompliance with Rule 5 (a) of the Federal Rules of Criminal Procedure, yet the Court observes in a footnote:

> "After the evidence was all in, the trial judge stated that without the confessions 'there was nothing left in the case.' The trial judge instructed the jury to acquit if they found that the petitioner had not confessed 'voluntarily but because he was beaten.' *On this issue of physical violence the jury found against the petitioner, and therefore the issue is not involved in this case.*" (Emphasis supplied).

Contrast that with the petitioner's case. There is no evidence by petitioner on any physical violence. The only evidence offered was that of Officer Hickey, offered in accordance with the law of Washington calling for "all the circumstances," on the theory that it might be claimed hat Officer Hickey's mistreatment was in someway connected with the confession and should be offered to the court and jury. And the jury found against the petitioner.

CONCLUSION

In conclusion, respondent submits to this court that from the record there is no Federal question involved in this matter since it was not raised before the courts of the State of Washington.

From the record, as distinguished from the petitioner's frantic assertions, it clearly appears that no duress or coercion was imposed upon the petitioner to procure his confession. The record clearly shows that the oral confession was given by a man who, apprehended *in flagrante delicto*, realized that his crimes were overtaking him, and having been unsuccessful in getting his arresting officers to shoot him to death, then desired to explain everything to the authorities and the doctor. The written confession speaks loudly of the petitioner's desire finally and ultimately to get these matters exactly right, as illustrated by the phraseology and the careful deletion, and as further illustrated by his repeating all these statements a few days later to another officer in almost the exact phraseology.

The respondent urges that against these facts, proven in open court with respondent itself accounting to the jury for all of the petitioner's injuries, this honorable court cannot now say that the later assertions of the petitioner, unsubstantiated, uncross-examined, and made with a reckless disregard of directly contrary evidence produced in open court and refined by

vigorous cross-examination, shall prevail. The respondent respectfully submits that a consideration of the record and the evidence contained therein gives this honorable court ample justification for a denial of the petition for a writ of certiorari, and the respondent urges that the petition be denied.

Respectfully submitted,

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